

S.B. CIVIL WRIT PETITION NO.3664/2004
(Jethmal Sharma vs. Smt. Ajija Banu & Ors.)

Date :: 29.03.2007

HON'BLE MR. JUSTICE GOPAL KRISHAN VYAS

Mr.N.K. Sharma, for the petitioner.
Mr.G.R. Kalla, for the respondents.

Heard learned counsel for the petitioner.

By way of filing present writ petition, the petitioner is challenging the order passed by learned Additional Civil Judge (Senior Division) No.1, Jodhpur on 12th April, 2004 in Civil Original Suit No.186/2000, whereby the application filed by the petitioner under Order IX Rule 5 CPC was dismissed.

Learned counsel for the petitioner contended that Order IX Rule 5 CPC is mandatory in nature and notices were not filed within stipulated time, therefore, suit filed by the plaintiffs-respondents was required to be dismissed, but learned trial court erroneously rejected the application filed by the petitioner vide impugned order dated 12th April, 2004.

Learned counsel for the petitioner has invited attention of the Court towards the judgments reported in AIR 1954 Calcutta 369 [Shaw & Co., Vs. B. Shamaldas & Co.] and another reported in 2001 (2) Civil Court Cases 550 (Bombay) [Vishwanath Satwaji Gaikwad

Vs. Laxman Abaji Kavale & Ors.] and prayed that the suit filed by the plaintiffs-respondents may be ordered to be dismissed because notices for assuring summons of respondent No.2 of the suit were not filed within stipulated time as per Order 9 Rule 5 of CPC. Learned counsel for the petitioner also made certain other prayers in the writ petition with regard to considering the judgments and written arguments filed before the trial court at the time of adjudication of any application or suit or any proceeding. It is also prayed that the learned trial court is under an obligation to decide the case expeditiously, therefore, appropriate directions may be issued to the learned trial court.

On the other hand, learned counsel for the respondents invited attention of this Court towards judgment of Hon'ble Supreme Court reported in 2005 (7) SRJ page 202 in case of Salem Advocate Bar Association Tamil Nadu vs. Union of India, in which Hon'ble Apex Court held that Order IX Rule 5 is directory in nature and discretion is always left with the trial court to condone the delay, therefore, in view of the aforesaid judgment rendered by Hon'ble Supreme Court the petition deserves to be dismissed.

So far as other prayers made in the writ petition are concerned, it is submitted by the learned counsel for the respondents that consideration of the judgments and written arguments, if submitted by the parties, it is always necessary and obligatory for the

civil court to consider the same before any adjudication takes place. It is further contended by learned counsel for the respondents that all the cases pending before the civil court require to be decided expeditiously.

I have considered the rival submissions made by both the parties so also perused the judgments cited by both the learned counsel of the parties.

Order IX Rule 5 of C.P.C. reads as under:-

“Rule-5 Dismissal of suit where plaintiff after summons returned unserved, fails for [seven days] to apply for fresh summons – (1) Where after a summons has been issued to the defendant, or to one of several defendants, and returned unserved, the plaintiff fails, for a period of [seven days] from the date of return made to the Court by the officer ordinarily certifying to the Court returns made by the serving officers, to apply for the issue of a fresh summons the Court shall make an order that the suit be dismissed as against such defendant, unless the plaintiff has within the said period satisfied the Court that -

- (a) he has failed after using his best endeavours to discover the residence of the defendant, who has not been served, or
- (b) such defendant is avoiding service of process, or
- (c) there is any other sufficient cause for extending the time,

in which case the Court may extend the time for making such application for such period as it thinks fit.”

In para 48 of the judgment reported in 2005 (7) SRJ page 202 rendered by Hon'ble Supreme Court in case of Salem Advocate Bar

Association Tamil Nadu (supra), it has been held in para No.48 that Order IX Rule 5 is directory in nature.

In view of the aforesaid judgment of Hon'ble Supreme Court rendered in case of Salem Advocate Bar Association, Tamil Nadu (supra), I do not find any reason to interfere with the order passed by the learned trial court with regard to rejection of application filed by the petitioner under Order IX Rule 5 CPC.

As far as other prayers made in the writ petition are concerned, it is obvious that at the time of deciding any matter, the courts are always required to consider written arguments, if any filed by the parties, so also the judgments cited by the parties. Further, it is also expected from the trial courts that matters pending before them are required to be decided expeditiously without unnecessary delay. Thus, in the interest of justice, it is expected from the trial court to expedite the trial of this case also.

Accordingly, the writ petition fails and is hereby dismissed.

[GOPAL KRISHAN VYAS],J.

A.K. Chouhan/-